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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 338

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENT'S PETITION FOR A REHEARING.

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RESPONDENT'S PETITION FOR A REHEARING.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent, William Patrick Brandhove, herewith submits this his Petition for a Rehearing in the above-entitled cause and respectfully states:

REASONS FOR GRANTING A REHEARING IN THIS CAUSE.

I.

UNDER THE COURT'S DECISION IN THIS CASE, A VIOLATION OF A RIGHT GUARANTEED BY THE UNITED STATES CONSTITUTION STANDS WITHOUT REMEDY AND SUCH RIGHT IS THEREFORE DENIED.

It is axiomatic that a civil right cannot exist in the absence of a remedy for the violation thereof.

A civil right protected by the Federal Constitution against State action can be violated only by action taken under color of State Law.

Collins v. Hardyman, ... U.S. .....; 95 Ad. L. Ed. 806.

If the action taken is not under color of State law, hence not attributable to the State, this Court holds that redress must be sought under State law.

Collins v. Hardyman, ... U.S. .....; 95 Ad. L. Ed. 806.

In the instant case, a Committee of the California State Legislature has acted under color of the authority vested in it by the State law. That there was State action here is therefore clear and stands unquestioned.

Any immunity bestowed upon such Committee by State law makes the conclusion inescapable that either the Federal law provides for a remedy or that there is no remedy.

If the Federal law likewise makes such State action immune from redress, then such action, although unconstitutional within the Federal System, can be taken by the State with impunity.

This Court, in conferring immunity upon a State Legislative Committee and its members for action taken in violation of a citizen's rights under the United States Constitution in effect, for the first time in its history, denies the axiom that the States cannot circumvent the barriers set to their power by the Federal Constitution and Acts of Congress thereunder.

Under this decision, a State Legislative Committee, exercising State power against a citizen is allowed to overcome the Constitutional prohibitions against infringement of free speech, the right to petition the government for redress of grievances and the right to due process of law.

II.

THE LEGAL HISTORY, AS REFERRED TO IN THIS COURT'S DECISION, DOES NOT CONCERN A FEDERAL SYSTEM AND THE LIMITATIONS ON STATE POWER THEREUNDER.

The Court refers to the privilege of legislators to be free from arrest or civil process for their participation in legislative proceedings which is traced to

the parliamentary struggles of the 16th and 17th centuries in England. The powers of Parliament in England were and are vitally different from the power of any State Legislature of the United States. The fundamental difference lies in the sovereignty vested in the English Parliament with the result that the powers of this body are practically unlimited, whereas there are Federal limitations upon the powers of the States by virtue of the United States Constitution. These limitations of State power are equally limitations on their Legislatures, their legislative committees and the members thereof.

> "The Federal guaranty of due process extends to State action through its judicial as well as through its legislative, executive or administrative branch of government."
>
> *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680.

See:

Shelley v. Kramer, 334 U.S. 1, 15;
Ex Parte Virginia, 100 U.S. 339, 346-347.

See also:

Screws v. United States, 325 U.S. 91, 114, 133.

The decisive question presented in this case is whether a State Legislative Committee is subject to sanctions for violating the written Constitution of The United States, a problem which has no analogy where privileges of the English Parliament are involved. Notwithstanding this fact, there is no precedent in English history and none has been referred to by this

Court where immunity was granted to members of Parliament for forceful action based upon authority demanding obedience from a citizen, as distinguished from the exercise by members of Parliament of their privilege of freedom of speech and debate.

Respondent has emphasized in his brief and oral argument to this Court that speech may be met by speech, not by force. Here Respondent was subjected to force based upon State authority which took the matter out of the realm of free speech and debate of parliamentarians. Thus force was used and compulsion was involved. Among other things, Respondent was compelled to appear as a witness at a State hearing; to comply with the duties of a witness thereat; to go to jail first and then to stand trial for refusing to answer questions placed to intimidate and deter him from exercising his federal constitutional rights relied upon in his complaint.

The Massachusetts case of *Coffin v. Coffin*, 4 Mass. 1, from which a dictum has been quoted in this Court's decision, did not involve the exercise of State power against a citizen, let alone the exercise of such power in violation of the supremacy of the United States Constitution.

III.

THE COURT'S INTERPRETATION OF THE CIVIL RIGHTS STATUTES (8 U.S.C. SECTIONS 43, 47(3)) IS IN CONFLICT WITH THEIR PURPOSE AND FUNCTION, WHICH IS TO IMPLEMENT THE XIV AMENDMENT BY PROVIDING SANCTIONS AGAINST STATE ACTION IN DEFEASANCE OF SAID AMENDMENT.

Applying accepted rules of statutory interpretation, the clear language of a statute must prevail in the absence of compelling reasons showing that the statute does not mean what it says.

The language of the statute in question is clear and unambiguous in directing its proscription and providing sanctions against "Every person", who under color of state law "subjects or causes to be subjected any citizen of the United States * * * to the deprivation of any rights, privileges or immunities secured by the Constitution and laws * * *"

This language unequivocally expresses the intent of Congress to bring within its prohibition *everyone* who under color of State law takes the forbidden action, and any exception in favor of a person exercising State authority defeats the purpose of making XIV Amendment Rights impregnable against State power.

This reasoning underlies the decision in *Picking v. Penn. Ry. Co.*, 151 Fed. (2d) 240, which holds that immunity, if any, bestowed by common law upon judges exercising state judicial power as well as immunity of a Governor conferred by State law, offers no protection against the provisions of the Federal Civil Rights Statutes (8 U.S.C. sections 43, 47(3)).

In enacting these Civil Rights Statutes, the Congress made its choice within its constitutional powers; it placed the protection of the Federal rights of citizens higher than any interest of the State in the freedom of action of its agents.

If this choice now seems unwise, it would be for the Congress to correct.

IV.

THE REASONING OF THE COURT WITH RESPECT TO IMMUNITY OF THE INDIVIDUAL COMMITTEE MEMBERS FROM CIVIL LIABILITY HAS NO APPLICATION TO THE STATE LEGISLATIVE COMMITTEE AS SUCH.

Assuming that the Congress had made its choice to protect state legislators from personal damages where the violation of Constitutional rights is involved, does it follow that a State Legislative Committee, as an entity, should enjoy such immunity?

As we understand the Court's decision, legislators should not be restricted by fear of claims directed at them; this reasoning obviously does not apply to a State Legislative Committee whose liability is equivalent to liability of the State.

Respondent sued the Legislative Committee in question as an entity as well as the individual members thereof in this cause; in this connection it is respectfully submitted that, if the Court will re-examine this issue which was properly raised by Respondent in his complaint and Brief to this Court, a different judgment would obtain.

V.

THE FACTUAL SITUATION PRESENTED BY THE RECORD IN THIS CASE.

The Court has stated in its decision that the question of the scope of legislative privilege has only been considered as applied to the facts of the present case.

As stated in Respondent's Brief, this case is here solely upon the pleadings which consist of Respondent's complaint and Petitioners' motion to dismiss the same. The sole question presented is whether Respondent's verified complaint states a claim for relief against Petitioners under the Civil Rights Statutes (8 U.S.C., sections 43, 47(3)).

Unless the Court has now departed from the recognized rule of pleading that, upon a motion to dismiss or equivalent motion, the well pleaded facts of a complaint must be taken as true, Respondent is convinced that a re-examination of his complaint, to which no verified denial or answer has been filed, will convince the Court that a valid claim for relief is stated by him.

In this connection, Respondent respectfully points out that the following statements contained in the Court's decision are not supported by the record in the cause:

1. "In view of the conflict between this petition and evidence previously given by Brandhove, the Committee asked local prosecuting officials to institute criminal proceedings against him."

In this regard, it is respectfully submitted from the record:

(a) That there is in fact no conflict between Brandhove's petition to the California Legislature and evidence previously given by him to the legislative committee in question. (R. 18-22; 66-69.). The recognition of a purported conflict, it is respectfully submitted, is an invasion by the Court of the province of the trier of facts.

(b) That the reason for the Committee asking local prosecuting officials to institute criminal proceedings against Respondent, after he circulated his petition and before the Committee hearing, was in fact: "with malice and intent to intimidate and silence plaintiff (Respondent) and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances and also to deprive him of the equal protection of the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, * * *" (Complaint, R. 10).

2. "Brandhove indicated that evidence previously given by him to the committee was false, and he raised serious charges concerning the work of a committee investigating a problem within legislative concern."

In this regard it is respectfully submitted from the record:

(a) That Brandhove, nowhere in the record before this Court, or otherwise, indicated that evidence pre-

viously given by him was false. This is a conclusion of Petitioners Tenney and Burns in State telegrams sent to local officials (R. 23-26) devoid of actuality in fact; nor has the credibility of these Petitioners been tested or the record of the previous evidence be scrutinized upon this issue in a court of law.

(b) That the Committee at the time in question was not investigating a problem within legislative concern, but on the contrary, as alleged by Respondent in his complaint, held said Committee hearing: "for the purpose and object of suppressing the criticism of plaintiff (Respondent) in his circulated petition * * *" and "acted as judges and accused in the same cause." (R. 6-7.) In this connection it is also pleaded by Respondent that the subpoena requiring him to be present at the Committee hearing did not refer to or state the purpose or object of said hearing or of Respondent's required testimony. (R. 5, 22.)

> 3. "Damages of $10,000 were asked 'for legal counsel, traveling, hotel accommodations, and other matters pertaining and necessary to his defense' in the contempt proceeding arising out of the Committee hearings. The plaintiff also asked for punitive damages."

In this connection the attention of the Court is respectfully directed to paragraph 15 and the prayer of Respondent's complaint which include general damages suffered by Respondent for the deprivation of his most sacred Constitutional rights in addition to the items of special and punitive damage mentioned in the Court's decision (R. 10-11).

CONCLUSION.

The present case, on the record before the Court, presents a serious encroachment by State action upon the rights of a citizen secured and protected under the United States Constitution. Even more serious is the implication that this decision affords an opportunity to the several States to circumvent the Federal System and avoid the constitutional limitations of the XIV Amendment.

From the foregoing it is respectfully urged that the Court grant a rehearing to Respondent in this cause and upon further consideration in the premises, reverse the decision of the District Court, and with regard to Petitioners, affirm the decision of the Court of Appeals in this case.

Dated, San Francisco, California,
July 16, 1951.

Respectfully submitted,
MARTIN J. JARVIS,
ELMER P. DELANY,
RICHARD O. GRAW,
Attorneys for Respondent and Petitioner.

Certificate of Counsel.

I hereby certify that I am of Counsel for Respondent in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
July 16, 1951.

Martin J. Jarvis,
Of Counsel for Respondent.